sell, or if it is only an authority to sell without any direction, then the land retains its character as land until it is actually sold. If the directions of the will, as to proceeds, require a sale, it is equivalent to a positive direction to sell, and the land is deemed personal property from the death of the testator. In this case the executor was not directed, nor required to sell, except so far as a sale was necessary for the purpose of paying debts and the legacies directed to be paid. As to the rest, it was a mere power which he could exercise or not at his discretion, and therefore the land must be considered as having retained its character as land until actual sale.

When land for certain purposes is required to be converted into money, and in the sale more is sold than is required for these purposes, the excess of proceeds will be considered as land: Oberle *v.* Lerch, 18 N. J. Eq., 346.

The rules, as shown by the cases above digested, seems to be adopted universally throughout the United States: See Holland *v.* Cruft, 3 Gay (Mass.), 162; Hammond *v.* Putnam, 110 Mass., 232; Perkins *v.* Coghlan, 148 Mass.; Dodge *v.* Williams, 64 Wis., 70; *Ex parte* McBee, 63 N. C., 332; Loftus *v.* Glass, 15 Ark., 680; Pratt *v.* Taliaferro, 3 Leigh (Va.), 419; James *v.* Thockmorton, 57 Cal., 368: Ferguson *v.* Stuart's Ex., 14 Ohio, 140; Smithers *v.* Hooper, 23 Md., 273.

It is the adopted rule that conversion will be effected where, either from the will itself or from the circumstances of any particular case, the intention of the testator clearly appears to be that a sale shall be made, either at once, or at some fixed time in the future.

J. HOWARD RHOADS.

DEPARTMENT OF PROPERTY.

EDITOR-IN-CHIEF,
HON. CLEMENT B. PENROSE,
Assisted by
ALFRED ROLAND HAIG.

LENNIG'S ESTATE — FULLERTON'S APPEAL.[1] SUPREME COURT OF PENNSYLVANIA.

Charity—Perpetuity.

A charitable trust taking effect on a remote contingency in derogation of another charity, even though it involves a change of trustee, is valid. In Pennsylvania, under Act of May 9, 1889, P. L., 173, a gift to a charity is not void although it transgresses the rule against perpetuities.

[1] PER CURIAM, affirming PENROSE, J., of the Orphans' Court, Philadelphia Co., reported 154 Pa. St., 209.

GIFTS TO CHARITIES AND THE RULE AGAINST PERPETUITEIS.

The proper application of the rule against perpetuities to charitable devises and bequests has given rise to some interesting litigation. It has been said that the question of remoteness may occur in connection with charitable trusts in three ways: First, where there is a gift to a charity followed by a remote gift to an individual; second, a gift to an individual followed by a remote gift to a charity; and third, a gift to a charity followed by a remote gift to another charity: Gray on Perpetuities, § 592. To which may be added a fourth class, where there is an executory devise to a charity to take effect upon a contingency possibly remote.

The first two classes have always been regarded as subject to the rule against perpetuities, and need no discussion: Company of Pewterers *v.* Christ Hospital, 1 Vern., 161; Merrit *v.* Bucknam, 77 Me., 253; Theological Society *v.* Atty-Gen., 135 Mass., 285; Commissioners *v.* De Clifford, 1 Dr. & W., 245. But it is to be remembered that where the object of the charitable trust has ceased to exist, a clause restoring the property to the family of the testator has been held good: Atty-Gen. *v.* Pyle, 1 Atk., 435; Walsh *v.* The Secretary, 10 H. L. Ca., 367; Randell *v.* Dixon, 38 Ch. D., 213.

The third, and to a limited extent the fourth class, have been regarded as free from objection on the ground of remoteness, an exception worth consideration. To do this it is necessary to examine the purpose of the rule itself. If the object of the rule is to prevent perpetual *holdiug*, if "the ability to alienate" is the test, then no logical objection can be made to the exception. If a perpetuity has no other meaning than "an inalienable, indestructible interest," then it is but a natural sequence that the policy of the law, which permits the creation of charitable trusts for the purpose of holding property forever, should also protect them from such rules as would defeat that policy. If, on the other hand, the rule against perpetuities is, as Mr. GRAY states, directed not to preventing the alienation of present interests, but against the creation of remote future interests, the exception loses its logical consistency, and is open to the objections that are always to be urged against purely arbitrary rules, however great their seeming utility.

It is universally conceded that Mr. GRAY has stated the rule against perpetuities correctly, and in all cases involving private interests it will be found that the courts have made the time of vesting the controlling feature. But in cases of charities unconnected with private interests the courts have set aside this view and have based their reasoning upon the theory that the rule is directed against perpetual holding, thus involving the rule in an ambiguity distressing to accurate thinkers.

The cases discussing this subject are not numerous. The first of sufficient importance to merit attention is, The Society for the Propagation of the Gospel *v.* Atty-Gen., 3 Russ., 142. A testator, dying in 1715, directed his executors to pay the Society one thousand pounds, after the consecration of two Protestant bishops, one for the continent and one for the islands of North America, the income in the meantime to be applied for the benefit of missionaries of the So-

ciety. When in 1824 the bishops were appointed the fund was awarded to the Society with little discussion, as there were practically no conflicting claims.

The whole question, however, was raised in Christ's Hospital *v.* Grainger, 16 Sim., 83; 1 MacN. & G., 460; 1 H. & Tw., 533, properly regarded as the leading case. Property has been devised to the corporation of Reading upon charitable trusts, with a proviso that if the corporation should fail to perform its duties as trustee for one year, the property should go to the corporation of London for the benefit of Christ's Hospital. The corporation failed to perform its duties as trustee, and the question was upon the validity of the gift over. Since property held for charitable purposes is forever inalienable, the lord chancellor reasoned, the rule against perpetuities did not apply. The property was neither more nor less alienable because given from one charity to another. "Here," says Mr. GRAY, "with submission to so great an authority (Lord COTTENHAM) is the common confusion between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness." And, although the decision has long stood as authoritative, he would have it examined with a view to its rejection in any jurisdiction where the matter is not closed.

English writers have not felt called upon to offer objections to the ruling: Marsden on Perpetuities, 295; Tyssen on Charitable Bequests, 423; *re* Connington's Will, 8 W. R., 444. And the decision has met with approval in a recent case in the Court of Appeals: *In re* Tyler (1891), 3 Ch., 252. Testator gave a fund to trustees of the London Missionary Society, and committed the keys of his family vault in Highgate Cemetery to their charge, the same to be kept in good repair. Failing to comply with this request, the money to go to the Blue Coat School. The society, although willing to comply with wishes of the testator, objected to having the gift clogged with such a condition, contending with great justice that it would enable the testator to do indirectly that which he could not do directly, namely, to create a perpetual trust for a non-charitable object. The court, however, thought the case fell directly within the principle upon which Christ's Hospital *v.* Grainger (*supra*) was decided. And as to the suggestion that it would open the way to evasions of the law, it was thought that the decision would not go to the length of holding "that one could get out of the rule against perpetuities by making a charity a trustee." That, said the court, would be absurd. Much was said about the comparatively harmless nature of the condition attached to the bequest; but, though harmless, it was none the less for a private purpose, and renders it difficult to decide where the line is to be drawn.

Where the gift is for the establishment of a charity, subject to a condition precedent, such, for example, as a gift of land for a site, the court has not subjected such gifts to the rule against remoteness, but has laid down the general principle that all such conditions must be fulfilled within reasonable time. This applies only where the gift is immediately and entirely devoted to charity. If personal estate is once effectively

given to charity, it is taken out of the scope of the law of remoteness. But if the gift in trust for charity is itself conditional upon a future and uncertain event, it is regarded as subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent: Synnett *v.* Herbert L. R., 7 Ch., 232.

In Chamberlayne *v.* Brockett, L. R., 8 Ch., 206, there was a gift for the erection of alms houses, "when and so soon as land shall at any time be given for the purpose." The master of the rolls thought the gift void for remoteness, inasmuch as it was dependent upon an event which might not arise for an indefinite time. The lord chancellor thought that there was an immediate gift for charity. The case *in re* White's Trusts is a complete illustration of the working of the rule. Testator left a fund for the erection of alms houses when a proper site could be obtained. The gift was held good if the site were provided: 30 W. R., 837; but the trustees failing to obtain a site within reasonable time, it was held that the legacy lapsed: 33 Ch. D., 449.

The rule in Christ's Hospital *v.* Grainger has been quoted with approval in the American courts, but the question has seldom been directly raised. In the majority of instances the contest has been between the heirs-at-law and the executors, or testamentary trustees. Under such circumstances the natural inclination of a court will be in favor of sustaining the charitable intentions of the testator, and arguments which are calculated to restrict or perhaps defeat such intentions, will be distrusted. To fairly test the rule, it would be necessary for the point to arise in a suit by one charity to obtain the benefit of the gift over, upon the happening of the remote contingency which is to divest the previous charitable gift.

The decision in Christ's Hospital *v.* Grainger met with approval in Odell *v.* Odell, 10 Allen, 1. Here the trust was for the accumulation of income for fifty years, and then to charity. Justice GRAY, in reviewing the authorities, made particular mention of the leading case. Seven years later the same distinguished jurist had occasion to consider this question, then before the United States Supreme Court. The will in dispute directed that in case the institutions named as beneficiaries attempted to alienate the property devised, the executors were to enter and repossess the property, and in that event the property was devised to an orphan asylum: Jones *v.* Habersham, 107 U. S., 174. The Court could not see how the next of kin could be benefited whether the devise over were void or valid, but stated that "as an estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good."

The statement in the opinion that "the rule against perpetuities does not apply to charities" was incautious. That it does apply

to a limited extent was recognized in Russell *v.* Allen, 107 U. S., 163, where a rule was adopted that has been widely quoted, "a gift for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency which may possibly not happen within a life or lives in being and twenty-one years afterwards is valid provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person." The language of the Court may have referred to those cases only where the gift is to a non-existent charity, or to a charity upon the happening of a possibly remote contingency without a previous gift. But the rule has been extended equally to those cases where the gift is from one charity over to another: Stoors Agricultural School *v.* Whitney, 54 Conn., 342.

The question then arises, what is meant by an *immediate* gift to charity from this point of view? The courts of Connecticut have been compelled to answer this question. In Jocelyn *v.* Nott, 44 Conn., 55, the gift was to trustees, directing that if any Congregational church should desire to erect a meeting-house upon the land devised, and the trustees should be satisfied that the church was able to complete the same free from debt, the trustees were to convey the land to the church. "The devise," said the Court, "is vested only in the trustees, and no interest whatever has as yet vested in the party intended to be benefited, and as such an interest may never vest, the devise tends to create a perpetuity in the trustees and vest in them property which for all time to come may remain inalienable. This the law will not allow." On the other hand, in Woodruff *v.* March, 26 A., 846 (Conn.), testator left his residuary estate to trustees for the establishment of a school, providing certain lands and buildings in W —— be given free of cost for a location of the school. The court found in other parts of the will an intention to limit this proviso to the period of twenty years; but conceding that there was no such intention, the gift to the trustees was an immediate gift to charity, and should the land not be given within a reasonable time the intended purpose of the trust might fail, but it would be by the non-performance of a condition subsequent. See also New Haven Institute *v.* New Haven, 60 Conn., 32.

In Pennsylvania, the views of the Supreme Court, as expressed in the earlier cases, were not in harmony with Christ's Hospital *v.* Grainger, but in the long interval of time that elapsed before it became necessary to pass upon the question these views underwent a change. In Hilliard *v.* Miller, the devise was to certain church corporations to lend the income from the fund to young farmers and mechanics in loans secured by mortgages, and if the income should accumulate beyond the application for loans, then to apply the income to the erection of a hospital. It was decided that the first trust was not a charity, and, therefore, an illegal accumulation, and that since the gift to the hospital was not immediate, and might not vest within the legal period, it also fell: 10 Pa. St., 326.

While this is the only early case bearing directly on the question,

the words of the Chief Justice in Philadelphia *v.* Girard's Heirs are worth noting in this connection. The facts need not be mentioned as the Court went somewhat out of its way in discussing the subject. "Suppose," it was said, "that some of the directions given for the management of the charity are conditions upon which a new charity is depending, they would, therefore, on the showing of the claimants here, be void conditions of the new charity, because they may not happen within the time allowed for the vesting of executory devises, and, therefore, could not divest the already vested charity. Their character is such as to avoid rather the substitutionary charities than the principal and vested one:" 45 Pa. St., 29. It can hardly be doubted that a court expressing such views would, if a case had then arisen, have rendered a decision adverse to Christ's Hospital *v.* Grainger.

Time has wrought a change in the views of the courts, and it is not surprising to find to-day a sentiment overwhelmingly in favor of aiding and upholding charitable bequests by the use of every rule of construction that can reasonably be turned to their advantage. In the case of Franklin's Estate, 150 Pa. St., 437, testator bequeathed £1000 to the city of Philadelphia in trust to let out the same to young married artificers, and at the end of terms in gross of 100 and 200 years the fund with accumulations to go to the city and State for designated charitable purposes. It was urged on behalf of the petitioners, the representatives of the residuary legatee, that Christ's Hospital *v.* Grainger was not law in Pennsylvania. Conceding that the first gift was non-charitable and also that a contingent gift to a non-existing charity beyond the period allowed by the rule against perpetuities is void, the Orphans' Court could not see how this would favor the petitioners. "The gift, though its application for the purpose ultimately intended was deferred, was immediate, and the beneficiary was itself the trustee:" 27 W. N. C., 545.

In the Supreme Court the appeal was dismissed on a question of jurisdiction, and in consequence the matter was brought before the Common Pleas Court, 2 Pa. Dist., 435.

Passing over Hilliard *v.* Miller, *supra*, where a strikingly similar trust was characterized as "a loan office in the garb of a charity," the bequest for the aid of the young married artificers was held a good, charitable gift, and that on the whole Dr. Franklin's will "established in legal form three valid, benevolent and beneficial charities, neither one of which is vulnerable when assaulted upon any of the grounds which were argued before us." While admitting that Philadelphia *v.* Girard's Heirs (*supra*) correctly stated some of the objections to a perpetuity, the Court declared that "the greater objection is the accumulation of a large fund in individual hands, thereby creating a menace to the community." The danger arising from accumulations did not disturb the courts until long after the rule against perpetuities was settled law: Thellusson Act, 39 George III, c. 98. Objections on the ground of unlawful accumulation and objections on the ground of remoteness have always been treated as entirely distinct when historically considered.

So that if this opinion is literally adopted it will certainly add a new feature to the rule against remoteness.

In Lennig's Estate, 154 Pa. St., 209, the case annotated, the Court, in discussing Christ's Hospital *v.* Grainger, points out that the case is much stronger in favor of the ultimate charity where there is no change of trustees. But "whatever may be said of the soundness of the reasoning of Lord COTTENHAM, by whom the opinion was delivered, the question it would seem is no longer an open one in Pennsylvania, where the legislature has come to the relief of the judiciary by passing the Act of May 9th, 1889, P. L., 173, which in the most unequivocal terms declares that a gift for a charity shall not fail because transgressive of the rule against perpetuities." The act cited adds little to that of 1855, P. L., 331, which designed to extend the *cy pres* doctrine in Pennsylvania, Bispham's Equity (5th ed.) p. 197, n. 5, was not appealed to in questions of remoteness: Roger's Estate, 43 Leg. Int., 292. And it might naturally have been inferred that the Acts of 1885, P. L., 259, and of 1889, P. L., 173, were "merely auxiliary to and in aid of the purposes of the former acts upon the same subject:" Pepper's Estate, 154 Pa. St., 331. The judicial interpretation of the act, however, is final: Lewis' Estate, 1 Dist. Rep., 148, and the rule against perpetuities practically eliminated from the law of charitable bequests in Pennsylvania. The act is as follows:

SECTION 1.—"*Be it enacted, etc.*, That no disposition of property heretofore or hereafter made for any religious or charitable use shall fail for want of a trustee or by reason of the objects ceasing, or depending upon the discretion of a last trustee, or in excess of the annual value limited by law; but it shall be the duty of any court having equity jurisdiction in the proper county, to supply a trustee and by its decrees carry into effect the intent of the donor or testator so far as the same can be ascertained and carried into effect consistently with law or equity subject to an appeal as in other cases, etc."

The courts of New York having rejected the common-law doctrines regarding charities, have placed the law of charitable bequests upon a basis radically different from that of England: Bascom *v.* Albertson, 34 N. Y., 584; Holland *v.* Alcock, 108 N. Y., 312. The validity of trusts, therefore, for objects which the English law describes as charitable, are in New York governed by the same rules, by which the validity of trusts for private purposes are determined. In every case the vesting must take place within two lives in being at the time of testator's death: Cottman *v.* Grace, 112 N. Y., 299. The objection is not to the perpetual holding of property, for a gift to a duly incorporated charitable institution, for the purposes of its creation, is perfectly good: Holmes *v.* Mead, 52 N. Y., 332; *In re* Strickland's Estate, 17 N. Y. Supplement, 304.

The chief difficulty has arisen in the case of a bequest to a corporation non-existent at the time of testator's death. If the will expressly provides that the corporation must be created within the period allowed for the vesting of future estates, the gift is valid: Shipman *v.* Robbins, 98 N. Y., 311; Burrill

v. Boardman, 43 N. Y., 254. In the latter case the testator provided for the establishment of a hospital, to be incorporated within two years after testator's death, provided two lives named in his will should continue so long. The decision in favor of the validity of this gift was regarded as "a pronounced departure from what was supposed to be the rule governing charitable bequests:" People *v.* Simonson, 126 N. Y., 299, and the conditions of the law are to be strictly maintained. In Cruishank *v.* Home of the Friendless, 113 N. Y., 337, the executors were to apply as soon as practicable to the legislature for an act incorporating the institution. The trust was held incapable of being sustained for the reason that the incorporation was dependent upon the will of the legislature, and the period of delay contingent upon the action of the State was not measured by lives: Booth *v.* Baptist Church, 126 N. Y., 215; Tilden *v.* Green, 130 N. Y., 29.

With the law so adverse to gifts for charitable purposes it seems hardly possible that the question of a gift over from one charity to another, upon a remote contingency, could be raised in New York. The point, however, has been alluded to in one of the inferior courts: *In re* Williams' Estate, 1 Misc. Rep., N. Y., 440. The bequest was to trustees, to apply the income from the fund to the payment of the salary of the pastor of a church, subject to the condition that, if ever the said church should become extinct, the trustees were to turn over the amount held in trust to the Board of Church Extension. This last gift over, the Court remarked, "was hopelessly bad, and no attempt was made on the argument to defend it."

The will construed in the case of Judevine *v.* Judevine, 61 Vt., 589, contains clauses that might have called for explanation if the question of remoteness had been raised. A trust-fund was set apart for the education of deserving young men, and at any time after five years from testator's decease the executors might in their discretion appropriate what remained to the towns of C and H for school purposes. A codicil provided, "should either town, or both, neglect to carry out the provisions set forth by me, the fund delivered and paid to such town by my executor is to be collected from such town and placed in some other town that will carry out my desires." As the court did not find it necessary to refer to this last clause, it must be presumed that no difficulty was presented to its mind in regard to the remoteness of the gift over to the unnamed towns.

Although technical objections may be urged against the ruling in Christ's Hospital *v.* Grainger, based as it is said to be upon a misconception of the purpose of the rule against perpetuities, it is far from likely that it ever will be disturbed. It is always, of course, more satisfactory when legal conclusions are drawn from clear, true, and unambiguous premises, but the precedent has been found useful and convenient for citation, to those conflicts where the charitable intentions of the testator are opposed by the claims of collaterals. If it is to be the policy of the law that charitable gifts are to be favored to the greatest possible extent, then the rule against perpetuities must yield to that policy.

WM. HENRY LOYD, JR.